

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
<b>Applications of Raycom Media, Inc. and Gray Television, Inc.</b>	)	MB Docket No. 18-230
	)	
For Consent to Transfer Control of Licenses and Authorizations	)	
	)	

**COMMENTS OF DISH NETWORK L.L.C.**

DISH Network L.L.C. (“DISH”)<sup>1</sup> respectfully submits these comments in response to the Commission’s *Public Notice* seeking comment on the applications filed for the transfer of control and assignment of licensees from Raycom Media, Inc. to Gray Television, Inc. (collectively, the “Applications”).<sup>2</sup>

**I. INTRODUCTION AND SUMMARY**

Through its proposed \$3.6 billion transaction, Gray seeks to become the third largest broadcast group in the country, trailing only Sinclair and Nexstar. If approved, the combined company will own or operate 124 television stations in 92 markets and reach 24 percent of

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<sup>1</sup> DISH is a multichannel video programming distributor (“MVPD”) that retransmits local broadcast stations in every one of the 210 designated market areas in the United States. DISH today has retransmission consent agreements with both Applicants, allowing it to retransmit certain local broadcast stations owned by the Applicants. DISH expects to negotiate with both Applicants in the future for continued retransmission of their stations. For these and other reasons described herein, DISH is a party in interest under Section 309(d)(1) of the Communications Act. *See* 47 U.S.C. § 309(d)(1).

<sup>2</sup> *See* Public Notice, MB Docket No. 18-230, Applications Filed for the Transfer of Control and Assignment of Broadcast Television Licenses from Raycom Media, Inc. to Gray Television Inc., DA 18-782 (July 27, 2018).

households in the country.<sup>3</sup> The proposed transaction also includes two markets—Honolulu, Hawaii and Amarillo, Texas—in which Gray seeks consent to retain Raycom’s existing “duopolies.”<sup>4</sup>

This transaction threatens to drive up retransmission consent fees (and, in turn, consumer prices) and to increase the risk and incidence of broadcast programming blackouts in the affected DMAs. Indeed, the market for retransmission consent is already broken: from 2006 to 2016, these fees increased by 3591%.<sup>5</sup> Broadcaster consolidation only exacerbates this trend: increased retransmission consent fees are a very likely consequence of this merger, given the merged entity’s dramatic increase in negotiating power. Because this merger will enable two broadcast groups to combine their stations to increase negotiating leverage, threaten blackouts to pay-TV subscribers and raise prices, this transaction does not serve the public interest.

## II. STANDARD OF REVIEW

Under Section 310(d) of the Communications Act (“the Act”), the Commission must determine whether the proposed transfer of broadcast station licenses to Gray will serve “the public interest, convenience, and necessity.”<sup>6</sup> This requires an evaluation of whether the

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<sup>3</sup> Comprehensive Exhibit, Application of Raycom Media, Inc. and Gray Television, Inc., MB Docket No. 18-230, at 1 (July 11, 2018) (“*Comprehensive Exhibit*”).

<sup>4</sup> *Id.* at 27. This transaction also involves nine markets in which Gray and Raycom both own full-power television stations and the resulting common ownership would violate the FCC’s local television multiple ownership rule. The Applicants have stated they plan to divest one station in those markets. *See id.* at 2.

<sup>5</sup> Petition to Dismiss or Deny of DISH Network, L.L.C., MB Docket No. 17-179, at 36 (Aug. 7, 2017) (“*Sinclair Petition to Deny*”) (“[B]roadcast retransmission fees reached \$6.4 billion in 2015 and 7.9 billion in 2016. In 2016, therefore, they turned out to be 3591% of the 2006 number. Recent projections estimate that, by 2023, retransmission fees will increase to \$12.82 billion, and 5,880% of 2006 revenues.”) (internal citations omitted).

<sup>6</sup> 47 U.S.C. § 310(d); *see also* Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4247 ¶ 22 (2011) (“*Comcast-NBCU*”).

transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes, as well as an assessment of whether the transaction complies with applicable laws and regulations.<sup>7</sup> The Applicants must prove that the transaction will serve the public interest, convenience, and necessity. It is not enough for the Applicants to prove that the transaction will not be harmful to consumers and competition; rather, they must prove that it would benefit competition.

The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest.<sup>8</sup> If the Commission identifies competitive harms that would be produced by a merger, then the Commission considers whether such harms can be addressed by appropriate conditions on the transaction.<sup>9</sup> The Commission does not even consider the potential benefits unless it has already found that any harms can be ameliorated through merger-specific conditions.<sup>10</sup> Further, those benefits must be: 1) transaction specific—likely to occur as a result of the transaction but unlikely to be realized by other practical means

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*Order*”).

<sup>7</sup> See Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, *Memorandum Opinion and Order and Report and Order*, 23 FCC Rcd. 12348, 12363-64 ¶ 30 (2008); News Corp. and the DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, for Authority to Transfer Control, *Memorandum Opinion and Order*, 23 FCC Rcd. 3265, 3276-77 ¶ 22 (2008) (“*Liberty Media-DIRECTV Order*”); SBC Commc’ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control, *Memorandum Opinion and Order*, 20 FCC Rcd. 18290, 18300 ¶ 16 (2005).

<sup>8</sup> See *Comcast-NBCU Order*, 26 FCC Rcd. at 4247 ¶ 22 n. 42 (citing *Sirius-XM Order*, 23 FCC Rcd. at 123634, ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3277 ¶ 22).

<sup>9</sup> Applications of Level 3 Communications Inc. and CenturyLink for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 32 FCC Rcd. 9581, 9585 ¶ 9 (2017).

<sup>10</sup> *Id.* at 9586 ¶ 10. (“If the Commission has determined that a transaction raises no public interest harms or any such harms have been ameliorated by narrowly tailored conditions, the Commission next considers a transaction’s public interest benefits.”).

having fewer anti-competitive effects;<sup>11</sup> 2) verifiable—both in likelihood and magnitude;<sup>12</sup> and 3) for the benefit of consumers, and not solely for the benefit of the company.<sup>13</sup>

### **III. THE APPLICANTS HAVE NOT MET THEIR BURDEN OF PROVING THE TRANSACTION IS IN THE PUBLIC INTEREST**

The Applicants have failed to meet their burden. The Application provides a few pages of unverifiable and unquantified benefits, instead relying on conclusory assertions that the transaction will bring “synergies” that will allow the combined entity to “expand its service to all of its local communities.”<sup>14</sup> And, the Applicants say nothing about the transaction’s competitive effects. They do not offer any expert economic testimony on the harms, the benefits, or how the latter offset the former. Nor do they supply any factual declarations in support of their benefit claims.

For the Commission to fulfill its obligations under Sections 309(e) and 310(d) of the Act,<sup>15</sup> and for DISH and other commenters to evaluate and comment on the proposed transaction,

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<sup>11</sup> See *AT&T-T-Mobile Order*, 26 FCC Rcd. at 16247-48 ¶¶ 124-28 (“Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger.”).

<sup>12</sup> See *Comcast-NBCU Order*, 26 FCC Rcd. at 4331 ¶ 226 (“The Applicants . . . are required to provide sufficient supporting evidence to permit us to verify the likelihood and magnitude of each claimed benefit. Benefits expected to occur only in the distant future are inherently more speculative than more immediate benefits.”); see also *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3330-31 ¶¶ 140-41.

<sup>13</sup> See *Comcast-NBCU Order*, 26 FCC Rcd. at 4331 ¶ 226; see also Applications of Western Wireless Corp. and ALLTEL Corp. for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 20 FCC Rcd. 13053, 13100 ¶ 132 (2005).

<sup>14</sup> *Comprehensive Exhibit* at 4.

<sup>15</sup> 47 U.S.C. §§ 309(a), 310(d).

as they have the right to do,<sup>16</sup> the Applicants should supplement their Applications with substantial additional information, including, at a minimum:

1. All documents addressing the process by which each company considered the merits of this transaction, the reasons why the transaction would be advantageous, and, specifically, any information demonstrating any consideration in either company that the transaction could affect the going-forward rate of fees charged to MVPDs or OVDs and availability of streaming video services;
2. Analyses to support and quantify the Applicants' contention that the combined company will "realize the efficiencies of scale and scope necessary to maintain current levels of top-quality service and to make the capital investments necessary to improve that service"<sup>17</sup> including specific business synergies and efficiencies that will facilitate such investment or otherwise aid the operation of Gray were the transaction to be consummated;
3. All analyses and documents relating to historic and projected future capital expenditures, headcounts, and programming plans for each of Gray and Raycom, and for the proposed, consolidated company;
4. Documentation and data with respect to recently acquired stations and the addition of local and news programming, specifically breaking out, for each station, the weekly addition (or loss) of hours of 1) local news, 2) other local programming, and 3) news or interest segments not originated by the station;
5. All documents related to any shared services or local marketing agreements between Gray or Raycom stations and third-party stations;
6. All documents or analyses addressing or relating to the use of "most-favored nation" ("MFN") clauses in retransmission consent agreements to establish pricing floors for retransmission rates in retransmission negotiations with other MVPDs;
7. Identification of all changes in station ownership (stations acquired or sold) since 2010 and station affiliation;
8. Monthly data for 2010 to present on advertising revenues earned, sharing payments for advertising paid to station affiliates, and subscriber and/or viewer bases for advertising fees, by MVPD, by station;

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<sup>16</sup> See Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, *Protective Order*, 30 FCC Rcd. 10360, 10364 ¶ 7 (2015) ("[P]etitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications.").

<sup>17</sup> *Comprehensive Exhibit* at 3.

9. All retransmission consent agreements with MVPDs and network affiliation agreements since 2010; monthly data (including both total fees and per-subscriber fees) for 2010 to the present on: (i) retransmission fee revenues earned, (ii) reverse retransmission fees paid (retransmission fees remitted to affiliated networks), and (iii) subscriber bases for retransmission fees, by MVPD, by station;
10. All documents relating or pertaining to retransmission consent strategy and negotiations with MVPDs and affiliated networks, including without limitation all documents relating to strategy and negotiations in connection with all blackouts of local programming in which Applicants have been involved since 2010; and
11. All documents and data with respect to the effects on advertising revenues of any blackouts of local programming in which Applicants' stations have been involved on such revenues.

#### **IV. THE TRANSACTION WILL LEAD TO HIGHER RETRANSMISSION FEES AND HIGHER PRICES FOR CONSUMERS**

##### **A. The Market for Retransmission Consent is Broken, Leaving Consumers Vulnerable to Ever-Escalating Fees and Increased Incidences of Blackouts.**

During the last decade, local broadcast station blackouts have continued to rise and retransmission consent rates have skyrocketed, all to the detriment of consumers. In 2010, there were eight blackouts across the country.<sup>18</sup> In 2017, they reached an all-time high of 213. This year, there have been 83 blackouts through the end of June 2018 alone.<sup>19</sup> According to the American Television Alliance, “[c]onsumers were blacked out twice as many times in 2017 as they were in 2016 – a 107 percent increase year over year.”<sup>20</sup> Against this backdrop, it is not

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<sup>18</sup> See Comments of the American Television Alliance, MB Docket No. 15-216, at ii (Dec. 1, 2015).

<sup>19</sup> See *Blackout List 2010-2018*, American Television Alliance, available at <http://www.americantelevisionalliance.org/media-center> (last visited Aug. 17, 2018).

<sup>20</sup> Press Release, American Television Alliance, *Univision Communications Inc. Initiates Massive Nationwide Blackout for Dish Latino Customers* (July 1, 2018), available at <http://www.americantelevisionalliance.org/univision-communications-inc-initiates-massive-nationwide-blackout-for-dishlatino-customers>.

surprising to learn that broadcasters pocketed \$9.3 billion from pay-TV providers in 2017 for “free” TV, a staggering increase from the \$28 million charged in 2005.<sup>21</sup>

The rise in retransmission consent fees is due, in part, to the increased leverage broadcasters now enjoy and the uneven playing field that has resulted from the competitive imbalance in the marketplace. When the 1992 Cable Act was passed, Congress noted that “most cable television subscribers have no opportunity to select between competing cable systems” and that “the cable industry has become highly concentrated.”<sup>22</sup> Indeed, in 1992 cable operators served 98 percent of MVPD households.<sup>23</sup> Today, however, consumers face more competition than ever in the market for MVPD services, with some markets having as many as five MVPDs to choose from.<sup>24</sup> On the other side of the negotiating table, there is only one affiliate for each broadcast network in each market. This asymmetry thus gives broadcasters undue leverage in negotiations with MVPDs, because they know that customers, many of whom want all four networks, can switch providers in the case of a programming blackout. The media consolidation threatened by this transaction will only worsen this trend, by providing Gray the ability to hold a significant swath of the country’s pay-TV customers hostage in retransmission consent negotiations, leading to higher prices and increased blackouts.

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<sup>21</sup> *Id.*

<sup>22</sup> Cable Television Consumer Protection and Competition Act of 1992, Section 2 (a), Pub. L. No. 102-385, §§ 2(a)(2), (a)(4) (Oct. 5, 1992).

<sup>23</sup> See Comments of the National Cable & Telecommunications Association, MB Docket No. 15-158, at 3 (Aug. 21, 2015) (*citing* NCTA Analysis of SNL Kagan Data).

<sup>24</sup> See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Sixteenth Report*, 30 FCC Rcd. 3253, 3261 ¶ 22 (2015).

**B. The Transaction Will Lead to Higher Prices for DISH and Consumers.**

DISH incorporates by reference the public versions of its Petition to Deny and Reply in the proceeding reviewing Sinclair’s proposed acquisition of Tribune, including the extensive econometric analyses prepared by Professor Janusz Ordovery, former Deputy Assistant Attorney General for Economics at the Antitrust Division at the Department of Justice under President George H.W. Bush, in conjunction with Dr. Theresa Sullivan of Compass Lexecon and Mr. William Zarakas and Dr. Jeremy Verlinda of the Brattle Group (the “Ordovery Study”).<sup>25</sup> The Ordovery Study conducted a first-of-its-kind analysis, connecting retransmission fees to the overall size of the broadcast group and to the number of markets where the group controls more than one station. The study also connected pay-TV subscriber losses in a local market during a blackout to the number of stations controlled by the same group in that market. The conclusion from these causal relationships is that the increased broadcast group size that will result from such consolidation will empower a merged entity to demand and obtain higher prices—price increases that will ultimately be borne by the American consumer.

The conclusions reached by the Ordovery Study can be applied to the consolidation proposed in this transaction:

- Other things being equal, the larger the broadcast group, the higher the retransmission fee paid by the MVPD;
- Other things being equal, the more local station duopolies controlled by broadcast group, the higher the retransmission fee paid by the MVPD;
- The blackout of two stations in a local market costs MVPDs greater customer losses than the loss of one station, and is a more effective weapon for the broadcaster to threaten distributors into capitulation;

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<sup>25</sup> See Declarations of Janusz A. Ordovery and William P. Zarakas and Jeremy A. Verlinda, Exhibits D and E to *Sinclair Petition to Deny*; Reply Declaration of Janusz A. Ordovery and Reply Declaration of William P. Zarakas and Jeremy A. Verlinda, Exhibits C and D to Reply of DISH Network L.L.C., MB Docket No. 17-179 (Aug. 29, 2017).



- New Gray will likely demand and achieve greater price increases than each of Gray and Raycom standing alone;
- Part of these price increases will likely be passed through by DISH and other distributors to consumers; and
- One of the key factors contributing to rising retransmission fees is broadcaster consolidation. The Gray/Raycom merger will likely exacerbate the trend towards higher retransmission fees.

In addition, DISH's economists analyzed the changes in retransmission fees charged by broadcast groups that were involved in the ten major broadcast industry transactions since August 2013. In all cases, the retransmission fee that DISH paid the combined broadcast group in the first year of the first post-merger contract was greater by large percentages than the retransmission fee that it would have paid without the merger, even after adjusting for industry-wide retransmission fee increases.<sup>26</sup>

## V. CONCLUSION

Gray's proposed acquisition of Raycom threatens to raise prices for American consumers. As a result of these and other harms, this proposed transaction does not serve the public interest.

Respectfully submitted,

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/s/

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<sup>26</sup> See Reply of DISH Network L.L.C., MB Docket No. 17-179, 5-6 (Aug. 29, 2017). *See also* Reply Declaration of William P. Zarakas and Jeremy A. Verlinda, Exhibit D to Reply of DISH Network L.L.C., MB Docket No. 17-179, ¶ 43 (Aug. 29, 2017).